APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 84—September Term, 1966.

(Argued October 25, 1966 Decided November 16, 1966.)

Docket No. 30427

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL MYERSON, a/k/a MEYER MEYERSOHN,

Appellant.

Before:

LUMBARD, *Chief Judge,*

MOORE and KAUFMAN, *Circuit Judges.*

Appeal from a judgment of conviction for violation of 26 U. S. C. §7201 (wilful evasion of federal income tax) entered by the United States District Court for the Southern District of New York after a trial before Hon. Charles H. Tenney and a jury. Affirmed.

PHILIP J. RYAN, New York, New York (Ryan, Temkin & Ginsberg, New York, New York, on the brief), *for appellant.*

Appendix A

CHARLES P. SIFTON, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, New York, New York, Daniel R. Murdock and Michael W. Mitchell, Assistant United States Attorneys, on the brief), *for appellee.*

PER CURIAM:

Appellant was convicted on a one-count indictment of fraudulent evading and defeating a large part of the federal income tax due and owing by him and his wife for the calendar year 1956, in violation of 26 U. S. C. §7201. Upon the trial, the government introduced substantial evidence as to appellant's guilt and appellant raises no question here as to its sufficiency. Instead, appellant urges three assignments of error: (1) the six-year statute of limitations had run prior to the return of the indictment; (2) the jury's deliberations were infected by the physical and emotional strain imposed on its members by an electric power failure causing a city-wide blackout of substantial duration; and (3) the trial court erred in failing to compel the prosecution to turn over to the defense certain "witness sheets."

Appellant filed his income tax return on February 5, 1957. The six-year period of limitations for the wilful evasion of tax, established by 26 U. S. C. §6531(2), commenced to run from the last date upon which the 1956 return was due, to wit, April 15, 1957.[1] The indictment was

[1] Appellant argued below, but does not argue here, that the statute of limitations should begin to run from the day he actually filed his return (i.e., February 5, 1957) rather than from the last due day for 1956 returns. We agree with the district court's conclusion that the choice of the last due date is compelled by the statute. See 28 U. S. C. §§6531, 6513.

returned on August 8, 1963, some 115 days after the expiration of six years. Section 6531 of 26 U. S. C., however, provides for a tolling of the limitations statute whenever a person committing an offense under the internal revenue laws "is outside the United States or is a fugitive from justice." It was established at trial that appellant had been "outside the United States" in excess of 115 days during the relevant period. Appellant argues that the section was not intended to apply to periods spent "outside the United States" unless the circumstances indicated flight, a substantial impediment to the investigation and enforcement of the internal revenue laws, an evasion of legal process or, at least, a change of residence. We disagree. The statute is unambiguous on its face and clearly covers appellant's absences. There is nothing unreasonable or arbitrary about the tolling of the statute of limitations during an offender's absence from the country. Appellant's claim that the statute, if applied to ordinary business or pleasure trips, is unconstitutional is without merit.

We also reject appellant's contention that the jury was unable to deliberate fairly or intelligently due to the physical and mental discomfort caused by the fact that shortly after the jury retired the lights went out as a result of the general Northeast blackout of November 9, 1965. The record discloses that the jury was adequately provided for in that its members were permitted to make one phone call each in the presence of a marshal, were offered hotel accommodations (which were turned down on account of the substantial descending and climbing of stairs that would have been involved), and were provided with sandwiches and hot coffee. Moreover, appellant's attorney both consented during the trial to the jury's continued deliberations in spite of the blackout and failed to object at the end of

the trial even though the trial judge invited comment when he read a summary of the night's events into the record.

Appellant's last point is that he was entitled to possession of certain "witness sheets." At the trial, a government witness testified on cross-examination that prior to taking the stand he had looked at some twenty pages of "witness sheets"—papers prepared by the government containing the witness's anticipated testimony. Appellant contends that these witness sheets embodied a "statement" by the witness within the meaning of 18 U. S. C. §3500 and thus should have been turned over to appellant's attorney on demand. We hold that the contested witness sheets are not §3500 material as they are neither a "statement made by . . . and signed or otherwise adopted or approved" by the witness, 18 U. S. C. §3500(e)(1), nor a "substantial verbatim recital of an oral statement" made by the witness. 18 U. S. C. §3500(e)(2).

Affirmed.

APPENDIX B

Constitutional Provisions

Amendment V, United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment VI, United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have previously been ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense."

Statute Involved

Section 6531, Title 26, United States Code:

§6531, Periods of Limitation on Criminal Prosecutions

No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal

revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitations shall be 6 years——

• • •

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;

• • •

The time during which the person committing any of the various offenses arising under the internal revenue laws is outside the United States or is a fugitive from justice within the meaning of section 3290 of Title 18 of the United States Code, shall not be taken as any part of the time limited by law for the commencement of such proceedings. . . . Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the Commissioner of the United States . . . Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68A Stat 815.

Rule Involved

Rule 52, Federal Rules of Criminal Procedure

"RULE 52. HARMLESS ERROR AND PLAIN ERROR

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(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

APPENDIX C

Judgment of Affirmance by United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of November one thousand nine hundred and sixty-six.

Present:

HON. J. EDWARD LUMBARD,
Chief Judge,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

MICHAEL MYERSON, a/k/a MEYER MEYERSON,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX D

Excerpts From Rulings of Trial Court Prior to Trial

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(3)

Insofar as the tolling of the Statute of Limitations is concerned, the Court rules that the statute is tolled if the defendant is either a fugitive from justice, which could take place within the United States, or if the defendant is outside of the United States, irrespective of his intent; in other words, whether he is on a business trip or whether these are periodic absences for a bona fide reason, and the statute is tolled irrespective of whether it be shown that the defendant's absence impeded the investigation.

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Excerpts From Charge of the Trial Court

(353)

Now, in the case before us the six-year statute of limitations began to run on April 16, 1957 and would have run out on April 16, 1963. The indictment was filed on August 8, 1963, which is six years and 115 days from the time the statute began to run and 115 days beyond the six-year period.

However, the Code further provides that

(354)

the statute of limitations is tolled for the period that the taxpayer is outside of the United States, that is, the statute stops running for the period that the taxpayer is outside the United States and begins to run again when he is within its geographical confines again.

Appendix D

Thus, the government must show that the taxpayer was outside of the United States for no less than 115 days, in other words, that the statute of limitations stopped running for those days, in order to justify instituting the prosecution six years and 115 days from the date that the statute began to run.

Now you need not make a specific finding as to the precise total number of days during which the defendant was outside of the United States, nor need you all agree on the exact number, except that to return a verdict of guilty in this case you must all agree unanimously that the defendant was outside the United States for no less than 115 days between April 16, 1957 and August 8, 1963.

Now, the intent of the taxpayer in being outside the United States is not relevant, nor is the duration of each sojourn, nor is it relevant whether or not it is impeding any investigation,

(355)

but the government must prove beyond a reasonable doubt the objective fact of being outside the United States, and you total up the amount of days that the government has so proved.

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Objection to Charge

(395)

Mr. Hollman: Your Honor, the defendant considers it to be a very fair charge. The only point, of course, is for the appellate record and would be on the question of the intent to evade or hinder an investigation when he was outside the country during the statute of limitations, but aside from that we have no objection.

Appendix D

(396)

The Court: That, of course, is contained in my ruling which I made earlier that his intent in being absent and whether or not it affected any investigation was not relevant.

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Proceedings During Jury Deliberations

(399)

(At 5:10 o'clock p.m. the jury retired to the juryroom to commence deliberations.)

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(414)

(At 4:10 o'clock a.m. note received from the jury.)
(The following took place in the robing room:)

The Court: Well, I think its appropriate

(415)

that we dictate something on the record about the occurrences this evening, and if there is anything that you want to add or correct or suggest, or whatever you think, note it down.

The lights went out in the court house and throughout the City at 5:28, shortly after the jury had retired to deliberate and after they had requested that certain exhibits be sent in to them, as evidenced by the written requests which they sent out.

When it appeared that the blackout would continue for some time, arrangements were made, a room secured at the Hotel Manhattan, and also arrangements made to transport the jurors in the prison van to the hotel.

However, at approximately 10:45, when the jurors were asked whether they wished to go to the hotel, after consideration they declined due to the fact that one member of the jury had a heart condition and the jury room was on the 13th floor of the court house and the hotel rooms were on the 11th floor of the Manhattan Hotel and arrangements were thereafter made to secure food and sandwiches and hot coffee for the jurors, and after that, with the consent of counsel

(416)

and at the suggestion of the jury they resumed their deliberations and certain exhibits, agreed upon by counsel, were sent into the juryroom and a record made of the exhibits so submitted to them.

I believe that the subsequent events have all been recorded by the reporter.

Is there anything that either one of you gentlemen would care to add?

I might say that I understand the jurors were permitted to make telephone calls one at a time in the presence of the marshal.

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(417)

The Court: Very well. If you can do that with the agents and with Mr. Hollman, we will have a brief recess.

I should say for the record that I have just received the following note from the jury at approximately 4:15 a.m.:

"We the jury have reached a verdict."

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